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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 388

THE UNITED STATES, PETITIONER

v.

HORACE HAVEMEYER

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Court of Claims of the United States.

OPINION BELOW

The opinion of the Court of Claims (R. 17–28) is reported in 59 F. Supp. 537. The dissenting opinion of Judge Madden (R. 28–30) is also reported therein.

JURISDICTION

The judgment of the Court of Claims was entered on April 2, 1945. (R. 30.) Time for filing petition for writ of certiorari was extended to August 31, 1945, by order of this Court dated

June 16, 1945 (R. 32). The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939.

QUESTION PRESENTED

In determining the value of large blocks of stocks for federal gift tax purposes, the court below ignored the prevailing market prices of the same stocks upon the New York Stock Exchange and found values which were based upon an assumption that the market prices would have been depressed if the blocks had been thrown upon the market at the valuation date.

The question presented is whether the potential effect of such an assumed forced liquidation may properly be considered as a factor in valuing the securities.

STATUTES AND REGULATIONS INVOLVED

The statutes and Regulations involved may be found in the Appendix, *infra,* pp. 16–23.

STATEMENT

The facts pertinent to the question presented here as found by the Court of Claims (R. 5–17) may be summarized as follows:

Respondent, a citizen and resident of New York, on November 19, 1934, made certain gifts to and in trust for the benefit of his four children. These included 160,000 shares of no par common stock of Great Western Sugar Company and

20,000 shares of no par common stock of South Porto Rico Sugar Company. Each of four different trusts received 40,000 shares of Great Western stock and 5,000 shares of South Porto Rico stock. (R. 5.)

Respondent's gift tax return reported the Great Western stock at a value of $28.125 a share in an aggregate total of $4,500,000 and the South Porto Rico stock at a value of $24.50 a share in an aggregate total of $490,000. These two stocks were listed on the New York Stock Exchange and the unit prices used in valuing the stock in the gift tax return represented the mean between the highest and lowest quoted selling prices upon the date of the gift. (R. 5–6.)

Both the preferred and common stocks of the Great Western Sugar Company were listed and traded upon the New York Stock Exchange. In 1932 the common stock had fallen to a depression low of something over $3 a share but thereafter staged a substantial recovery. Actual sales of Great Western common stock on the New York Stock Exchange by days, weeks and months appear in the record. (R. 10–11). On November 19, 1934, the record shows total sales of 2,500 shares at a high of $28\frac{3}{8}$ and a low of $27\frac{7}{8}$. Weekly sales for the week ending November 24, 1934, were 7,100 shares at a high of $28\frac{3}{8}$ and a low of $26\frac{3}{4}$. During the month of November 1934, 27,200 shares were sold at a high of $29\frac{3}{4}$ and a low of $26\frac{5}{8}$. The total value of the number of shares

of Great Western Sugar Company sold from January 1 to December 31, 1934, 653,400, computed upon the basis of the mean of the high and low prices for the year (30⅛), was $19,683,675. (R. 9–11.)

South Porto Rico Sugar Company common stock was listed and traded on the New York Stock Exchange. It had a 1932 depression low of $4.50 a share but had risen sharply thereafter. Actual sales of this common stock on the New York Stock Exchange appear by days, weeks and months in the record (R. 13–14). This shows 900 shares sold on November 19, 1934, at a high of $24⅞ and a low of $24¼; weekly sales for the week ended November 24, 1934, of 4,300 shares at a high of $24⅞ and a low of $24¼; and aggregate sales for the month of November 1934 of 18,200 shares at a high of $27 and a low of $23¼. The value of the total number of shares sold during the calendar year 1934, 224,200, based upon the mean of the high and low prices for the year (29 11/16), was $6,655,937.50. (R. 12–14.)

The proportion of the volume of trading in Great Western and South Porto Rico common stocks to their respective total outstanding shares compared favorably with the corresponding proportion of volume of trading in the Dow-Jones Industrials, and with the 10 most active stocks on the New York Stock Exchange on November 19, 1934, both on that date and for the year 1934. (R. 15.)

The markets for Great Western and South Porto Rico stocks on or about November 19, 1934, were reasonably good from the standpoint of volume of trading, free from misrepresentation or manipulation, and were free open markets where prices were determined by supply and demand. The prevailing prices of these stocks on the New York Stock Exchange on November 19, 1934, were fair prices for the volume of stock being traded on the market at that time. In general the buying public which was dealing in these stocks was fully informed as to all factors affecting their values and gave full effect thereto in the market prices prevailing on November 19, 1934. (R. 15.)

The donees of the separate gifts which plaintiff made on November 19, 1934, in the total amount of 160,000 of Great Western stock and 20,000 shares of South Porto Rico stock, did not sell these shares or any part thereof at or about that time or anywhere near that time. There is no evidence in the record that they ever offered all or any part of such stock for sale at any time, or that blocks of such stock of comparable size were offered for sale at one time at or about November 19, 1934. (R. 16.)

On November 19, 1934, an additional 160,000 shares of Great Western common stock or 20,000 shares of South Porto Rico common stock could not have been sold on the New York Stock Exchange without depressing the price. No element

of stock control prevailed with respect to the stock involved in this case, since the 160,000 shares of Great Western stock was equal to only 8.89% of the total shares outstanding, and the 20,000 shares of South Porto Rico stock was equal to only 2.68% of the total shares outstanding. (R. 16.)

The method of marketing the blocks of stock involved in this case which would have yielded the greatest return to a seller on November 19, 1934, would have been a sale to a group of investment bankers forming an underwriting syndicate for the purchase of the shares with the intention of reselling them to the public. Their price to the buying public would have been approximately $27.50 per share for the Great Western stock and $24 for the South Porto Rico stock. Their underwriting charge to the vendor for service and expense of selling would have amounted to two and one-half to three points on the former and two points on the latter. A seller could reasonably have expected to have received net approximately $25 per share for the Great Western stock and $22 per share for the South Porto Rico stock. (R. 16–17.)

Investment trusts, insurance companies, and financial institutions, which carry large blocks of listed stocks in their portfolios, ordinarily report to their stockholders and in their balance sheets the market value of such stocks on any given date at amounts obtained by multiplying the number

of shares owned by the prevailing market price on the exchanges on that date, regardless of the number of shares held. In some instances a further report is given by such companies to their stockholders of the estimated realizable value upon forced liquidation, which shows a discount from the market values just referred to on account of brokerage, transfer taxes, and blockage. (R. 17.)

The Court of Claims concluded that the fair market value on November 19, 1934, of the 160,000 shares of stock of Great Western was $25 a share, or $4,000,000; and the actual fair market value of the 20,000 shares of stock of South Porto Rico on November 19, 1934, was $22 a share, or $490,000. (R. 17.)

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In holding that the actual fair market values on November 19, 1934, of certain shares of Great Western Sugar Company and of certain shares of South Porto Rico Sugar Company stock were, respectively, $25 per share and $22 per share.

2. In failing and refusing to hold that such shares had a fair market value of $28.125 and $24.50, respectively, on November 19, 1934.

3. In holding that the applicable statute and Regulations permit the use of the so-called blockage method of valution of corporate stock in situations where, as here, the shares were held for

investment, were not sold and offered for sale, and the quoted market prices for such stocks on the New York Stock Exchange were fair prices for the volume of stock being traded on the market at that time in an amount which compared favorably with the reported trading in the Dow-Jones Industrials and ten most active stocks in the exchange.

4. In failing to follow the rule that where it is shown that there was a market in which like articles in volume were openly bought and sold, the prices current in such a market will be regarded as fair market value.

5. In relying solely on the facts that an additional 160,000 shares of Great Western common stock or 20,000 shares of South Porto Rico common stock could not have been sold on New York Stock Exchange without depressing the price as substantial justification for its rejection of the market prices as the proper criteria of the values.

6. In adopting criteria in conflict with the "willing seller and willing buyer rule" authoratively approved as the proper rule for determining equivalent values when reliable market prices are unavailable.

7. In relying on volume alone as a basis for the adoption of other criteria rather than on the principles that property of the same kind and use should be taxed on the same basis.

8. In adopting as the criteria the prices which might be offered by a dealer below the retail or

ultimate sales value which he expects to receive from the public and thus allowing reductions of hypothetical compensation to dealers for selling the shares.

9. In giving the word "value" the meaning of "estimated realizable value upon a forced liquidation."

10. In failing to enter judgment for the United States and failing to dismiss the petition.

11. In the alternative the court below misapplied the blockage theory and determined the value of blocks of 160,000 shares and 20,000 shares, respectively, and not the value of the separate gifts of blocks of 40,000 and 5,000 shares. Since there was no opinion evidence as to the value of the smaller blocks, the court below should have dismissed the petition for failure of proof.

REASONS FOR GRANTING THE WRIT

The basic question is whether a finding of value is to be predicated, as a matter of law, upon the amount realizable in a hypothetical forced liquidation. This is not only a question of law,[1] but a problem of fundamental importance in the administration of the federal gift and estate tax laws. The controversy involves a basic difference in views as to the ultimate place of the "blockage" theory in the field of valuation. The problem has provoked considerable litigation, and continues to hamper the administration of the fed-

[1] *Powers* v. *Commissioner*, 312 U. S. 259, 260.

eral gift and estate tax laws. During the 1941 Term, this Court denied the Government's petition for certiorari in *Helvering* v. *Maytag*, 316 U. S. 689, raising this issue. The problem, however, has not diminished in importance, and we are advised by the Commissioner of Internal Revenue that there are presently pending 156 gift and estate tax cases raising this issue, involving an aggregate of over $20,000,000.00 in taxes. The situation, involving as it does, principles of valuation, does not lend itself readily to statutory correction, and we respectfully urge that a final and authoritative decision would be in the public interest.

1. The rationale of the blockage argument, accepted by the court below to settle the controversy here, is that a large block of stock cannot ordinarily be marketed as readily as a few shares of the same stock; that whenever the number of shares to be valued is large in proportion to the volume of shares normally traded in upon an established market, then an offering of such a block would depress the market and consequently reduce the price which each share would bring; that the prevailing quoted market price for a particular stock actively traded in upon the New York Stock Exchange determined by supply and demand in a free, open, informed and active market undistorted by any abnormal conditions, although a fair price for the volume traded, is not a fair market price for such stock in quantities greater than the actual market volume at or about any particular

date; that the fair market value of such a block of stock for gift tax purposes is something less than the quoted unit market price times the number of shares to be valued, here approximately $3.125 less per share for the Great Western stock and $2.50 less per share for the South Porto Rico stock; that this discount may be based upon opinion evidence as to what might have been the result of an assumed sale even though no such sale was contemplated or was made at or about the material date; that it is proper not only to assume such a sale, but also to assume that the potential market supply could not be absorbed by any corresponding increase in market demand; and that this method of valuation for large blocks of stock is a proper method under the statute applicable in this case.

The court below found quoted market prices per share to have been determined by supply and demand in free, open, active and informed markets, undistorted by abnormal factors and fair prices for the respective quantities of each of the stocks which were being traded on the New York Stock Exchange. (R. 15.) Petitioner contends that this finding leaves nothing further for consideration in the determination of the values in question.[2]

The blockage theory conflicts with the established principle of law that fair market value or

[2] *United States* v. *New River Collieries*, 262 U. S. 341; cf. *Standard Oil Co.* v. *So. Pacific Co.*, 268 U. S. 146.

actual value of corporation stock is to be determined for tax purposes upon the basis of sales between willing buyers and willing sellers. Value may not be determined upon the basis of distress sales or forced liquidations. Yet this is precisely the effect of applying the blockage theory here. Except for the blockage theory, the prices for securities actively traded on the New York Stock Exchange would be accepted as the best evidence of value.[3]

The gift tax plan is one of graduated rates on cumulative gifts. The rates increase as the gifts become larger and, in computing the size, the gifts of prior years are added to those of a current year. Hence, one who makes twenty net gifts of $5,000 each pays the same tax as one who makes one net gift of $100,000. But if the decision of the court below is right and the value of 10,000 shares of stock is to be treated as something less than the sum of the values of ten lots of 1,000 shares each, the large gift carries a smaller rate than would the total of the smaller gifts. This, *pro tanto,* destroys the statutory plan and does so even though the donor has given away no less in one instance than in another.[4] More-

[3] Cf. *Hazeltine Corp.* v. *Commissioner*, 89 F. 2d 513, 519 (C. C. A. 3d); see also *W. T. Grant Co.* v. *Duggan*, 94 F. 2d 859, 861 (C. C. A. 2d); *Metropolitan Life Ins. Co.* v. *United States*, 65 C. Cls. 149, 163.

[4] Even if the blockage theory is to be applied here, the court below erred in lumping together the four separate gifts of 40,000 shares of Great Western and 5,000 shares of South

over, the decision below necessarily results in the anomaly that two shares of stock, each of which represents the same interest in the same corporate enterprise, may on the same date have different values for gift tax purposes simply because they are owned by different persons.

If the blockage theory is to be applied in the circumstances of this case, it may be doubted whether the Regulations apply to any gift of a block of shares aggregating more than the volume traded daily. Acceptance of the blockage theory will require taxpayers and administrative officers to litigate every issue going to the value of blocks of stock which exceed the daily volume of market trading, with the outcome dependent upon the acceptance or rejection of speculative opinions of witnesses. Thus the purpose of the Regulations will be frustrated. They establish a criterion of value which gives the statute efficient operation, administrative practicability, consistency, equality, and one which takes into account all of the elements of the value of property to a donor. The Regulations from 1933 to date are set forth in the Appendix, *infra*.

Porto Rico sugar, and determining value upon the basis of a single block of 160,000 shares of Great Western and a single block of 20,000 shares of South Porto Rico sugar. *Phipps* v. *Commissioner*, 43 B. T. A. 1010, 1022, affirmed, 127 F. 2d 214 (C. C. A. 10th), certiorari denied, 317 U. S. 645; *Avery* v. *Commissioner*, 3 T. C. 963, 971. See Specification of Error No. 11, *supra*, p. 9.

2. Several Circuit Courts of Appeals and the Tax Court have now held that the blockage theory properly may be applied in the valuation of stock for gift and for estate tax purposes.[5] Others have held that failure to apply the same theory, in circumstances not materially different from those presented here, is not error and that valuation based on market price is substantially supported.[6] The ultimate place of the blockage theory is still confused and unsettled. It has not been finally determined. *Phipps* v. *Commissioner*, 127 F. 2d 214, 216 (C. C. A. 10th), cer-

[5] *Groff* v. *Munford* (C. C. A. 2d), decided July 19, 1945 (1945 P-H par. 72,631); *Helvering* v. *Maytag*, 125 F. 2d 55 (C. C. A. 8th), certiorari denied, 316 U. S. 689; *Commissioner* v. *Shattuck*, 97 F. 2d 790 (C. C. A. 7th); *Helvering* v. *Kimberly*, 97 F. 2d 433 (C. C. A. 4th); *Helvering* v. *Safe Deposit & Trust Co. of Baltimore*, 95 F. 2d 806 (C. C. A. 4th); *Avery* v. *Commissioner*, 3 T. C. 963; *DuPont* v. *Commissioner*, 2 T. C. 246. See also *Rogers* v. *Helvering*, 107 F. 2d 394 (C. C. A. 2d), involving valuation of corporation stock for income tax purposes.

[6] *Mott* v. *Commissioner*, 139 F. 2d 317 (C. C. A. 6th); *Phipps* v. *Commissioner*, 127 F. 2d 214 (C. C. A. 10th), certiorari denied, 317 U. S. 645; *Bull* v. *Smith*, 119 F. 2d 490 (C. C. A. 2d); *Gamble* v. *Commissioner*, 101 F. 2d 565 (C. C. A. 6th), certiorari denied, 306 U. S. 664; *Richardson* v. *Helvering*, 80 F. 2d 548 (App. D. C.); *Roth* v. *Wardell*, 77 F. 2d 124 (C. C. A. 9th); *Allen* v. *Commissioner*, 3 T. C. 1224; *Estate of McKitterick* v. *Commissioner*, 42 B. T. A. 130; *Newberry* v. *Commissioner*, 39 B. T. A. 1123. See also *Hazeltine Corp.* v. *Commissioner*, 89 F. 2d 513 (C. C. A. 3d), and *Gordon, Trustee* v. *Commissioner*, 33 B. T. A. 460, involving valuation of corporation stock for income tax purposes.

tiorari denied, 317 U. S. 645. The dissenting opinion below demonstrates this. It is in the public interest that the situation be clarified by this Court.

CONCLUSION

This case presents a highly important fiscal problem. It warrants an authoritative ruling from this Court. It is, therefore, respectfully submitted that this petition for a writ of certiorari should be granted.

HAROLD JUDSON,
Acting Solicitor General.

AUGUST 1945.

APPENDIX

Revenue Act of 1932,[1] c. 209, 47 Stat. 169:

TITLE III—GIFT TAX

SEC. 501. IMPOSITION OF TAX.

(a) For the calendar year 1932 and each calendar year thereafter a tax, computed as provided in section 502, shall be imposed upon the transfer during such calendar year by any individual, resident or nonresident, of property by gift.

(b) The tax shall apply whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible; * * *.

SEC. 502. COMPUTATION OF TAX.

The tax for each calendar year shall be an amount equal to the excess of—

(1) a tax, computed in accordance with the Rate Schedule hereinafter set forth, or the aggregate sum of the net gifts for such calendar year and for each of the preceding calendar years, over

(2) a tax, computed in accordance with the Rate Schedule, on the aggregate sum of the net gifts for each of the preceding calendar years.

* * * * *

SEC. 504. NET GIFTS.

(a) *General Definition.*—The term "net gifts" means the total amount of gifts made

[1] Gift tax provisions of the Internal Revenue Code apply only to 1940 and later years. See Section 1000 (a).

during the calendar year, less the deductions provided in section 505.

(b) *Gifts Less Than $5,000.*—In the case of gifts (other than of future interests in property) made to any person by the donor during the calendar year, the first $5,000 of such gifts to such person shall not, for the purposes of subsection (a), be included in the total amount of gifts made during such year.

SEC. 505. DEDUCTIONS.

In computing net gifts for any calendar year there shall be allowed as deductions:

(a) *Residents.*—In the case of a citizen or resident—

(1) *Specific Exemption.*—An exemption of $50,000, less the aggregate of the amounts claimed and allowed as specific exemption for preceding calendar years.

* * * * *

SEC. 506. GIFTS MADE IN PROPERTY.

If the gift is made in property, the value thereof at the date of the gift shall be considered the amount of the gift.

SEC. 530. RULES AND REGULATIONS.

The Commissioner, with the approval of the Secretary, shall prescribe and publish all needful rules and regulations for the enforcement of this title.

Treasury Regulations 79 (1933 ed.):

ART. 19. *Valuation of property.*—(1) *General.*—The statute provides that if the gift is made in property, the value thereof at the date of the gift shall be considered the amount of the gift. The value of property is the price at which such property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell. Where the property is sold within a reasonable

period after the date of the gift, and it is shown that the selling price reflects the fair market value thereof as of the date of the gift, the selling price will be accepted as the amount of the gift. * * *

(3) *Stocks and bonds.*—The value of stocks and bonds listed upon a stock exchange should be determined by taking the mean between the highest and lowest quoted selling prices upon the date of the gift, except where such selling prices do not reflect the fair market value of the gift. If the gift was made on Sunday or on a holiday, the transactions of the next previous business day will govern. If there were no sales on the date of the gift, the value should be determined by taking the mean between the highest and lowest quoted selling prices upon the nearest date either before or after the date of the gift, if within a reasonable period. If the security is listed upon more than one exchange, the records of the principal exchange should be employed. In valuing listed stocks and bonds the donor should observe care to consult accurate records to obtain values as of the date of the gift.

* * * * *

Treasury Regulations 79 (1936 ed.):

ART. 19. *Valuation of property.*—(1) *General.*—The statute provides that if the gift is made in property, the value thereof at the date of the gift shall be considered the amount of the gift. The value of the property is the price at which such property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell. The value of a particular kind of property is not to be determined by a forced sale price

or by an estimate of what a whole block or aggregate would fetch if placed upon the market at one and the same time. Such value is to be determined by ascertaining as a basis the fair market value at the time of the gift of each unit of the property. For example, in the case of shares of stocks or bonds, such unit of property is a share or a bond. All relevant facts and elements of value as of the time of the gift should be considered. Depreciation or appreciation in value subsequent to the time of the gift are not relevant factors and will not be considered.

* * * * *

(3) *Stocks and bonds.*—The value at the date of the gift in case of stocks and bonds, within the meaning of the statute, is the fair market value per share or bond on such date.

The value of stocks and bonds listed upon a stock exchange shall be obtained by taking the mean between the highest and lowest quoted selling prices upon the date of the gift. * * *

* * * * *

In exceptional cases in which it is established by clear and convincing evidence that the value per bond or share of any security determined upon the basis of selling or bid and asked prices as herein provided does not reflect the fair market value thereof, other relevant facts and elements of value will be considered in determining the fair market value. The size of the gift of any security is not a relevant factor and will not be considered in such determination.

Subdivisions (1) and (3) of Article 19 of Treasury Regulations 79 (1936 ed.), quoted above, were amended by T. D. 4901, approved May 18,

1939, 1939–1 Cum. Bull. (Part 1) 341, to read as follows (pp. 341–342):

(1) General.—The statute provides that if the gift is made in property, the value thereof at the date of the gift shall be considered the amount of the gift. The value of the property is the price at which such property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell. The value of a particular kind of property is not to be determined by a forced sale price. Such value is to be determined by ascertaining as a basis the fair market value at the time of the gift of each unit of the property. For example, in the case of shares of stock or bonds, such unit of property is a share or a bond. All relevant facts and elements of value as of the time of the gift should be considered.

(3) *Stocks and bonds.*—The value at the date of the gift in the case of stocks and bonds, within the meaning of the statute, is the fair market value per share or bond on such date.

In the case of stocks and bonds listed on a stock exchange the mean between the highest and lowest quoted selling prices on the date of the gift shall be considered as the fair market value per share or bond. If there were no sales on the date of the gift, such value shall be determined by taking the mean between the highest and lowest sales on the nearest date before and the nearest date after the date of the gift (both such nearest dates being within a reasonable period), and by prorating the difference between such mean prices to the date of the gift, and by adding or subtracting, as the case may be, such prorated portion

of the difference to or from the mean price obtaining on such nearest date before the date of the gift. For example, assume that sales of stock nearest the date of the gift (June 15) occurred two days before (June 13) and three days after (June 18) and that on such days the mean sale prices per share were $10 and $15, respectively. The price of $12 shall be taken as representing the fair market value of a share of such stock as of the date of the gift. If, however, on June 13 and June 18 the mean sale prices per share were $15 and $10, respectively, the price of $13 shall be taken as representing the fair market value of a share of such stock as of the date of the gift. If the security was listed on more than one exchange, the records of the exchange where the security is principally dealt in should be employed. In valuing listed stocks and bonds the donor should observe care to consult accurate records to obtain values as of the date of the gift.

In the case of stocks and bonds which are not listed upon an exchange, but are dealt in through brokers, or have a market, the fair market value shall be determined by taking the mean between the highest and lowest selling prices as of the date of the gift; or, if there were no sales on that date, such value shall be determined by taking the mean between the highest and lowest sales on the nearest date before and the nearest date after the date of the gift (both such nearest dates being within a reasonable period), and by prorating the difference between such mean prices to the date of the gift, and by adding or subtracting, as the case may be, such prorated portion of the difference to or from the mean price obtaining on such nearest date before the

date of the gift. If quotations are obtained from brokers, or evidence as to the sale of securities is obtained from the officers of the issuing companies, the donor should preserve in his files the letters furnishing such quotations or evidence of sale for inspection when the return is verified by an investigating officer.

If actual sales are not available during a reasonable period beginning before and ending after the date of the gift, the fair market value may be determined by taking the mean between the bona fide bid and asked prices on the nearest date before and the nearest date after the date of the gift (both such nearest dates being within a reasonable period), and by prorating the difference between such mean prices to the date of the gift, and by adding or subtracting, as the case may be, such prorated portion of the difference to or from the mean price obtaining on such nearest date before the date of the gift.

If actual sale prices or quoted bona fide bid and asked prices are available on a date within a reasonable period prior to the date of the gift, and if no actual sale prices or bona fide bid and asked prices are available on a date within a reasonable period after the date of the gift, or vice versa, then the mean between such highest and lowest available sale prices or bid and asked prices may be taken as the value.

If actual sales or bona fide bid and asked prices are not available, then, in the case of corporate or other bonds, the value is to be arrived at by giving consideration to the soundness of the security, the interest yield, the date of maturity, and other relevant factors, and, in the case of shares of stock, upon the basis of the company's net worth,

earning power, dividend-paying capacity, and all other relevant factors having a bearing upon the value of the stock. Complete financial and other data upon which the donor bases his valuation should be summitted with the return.

In cases in which it is established that the value per bond or share of any security determined on the basis of selling or bid and asked prices as herein provided does not reflect the fair market value thereof, then some reasonable modification of such basis or other relevant facts and elements of value shall be considered in determining fair market value.

The provisions quoted next above from T. D. 4901 now appear verbatim as Section 86.19 (a) and (c) of Treasury Regulations 108 (1943 ed.) relating to gift tax for years subsequent to 1939 under the Internal Revenue Code.

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IN THE

Supreme Court of the United States

October Term, 1945.

No. 388.

THE UNITED STATES, *Petitioner,*

v.

HORACE HAVEMEYER.

On Petition For a Writ of Certiorari to the Court of Claims.

BRIEF FOR THE RESPONDENT IN OPPOSITION.

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OPINION BELOW.

The opinion of the Court of Claims is reported in 59 F. Supp. 537. It appears in the Record at pages 17-28. The special findings of the Court of Claims are at pages 5-17 of the Record and the dissenting opinion of Judge Madden is at pages 28-30.

JURISDICTION.

The Judgment of the Court of Claims was entered on April 2, 1945. (R. 30). Time for filing petition for a writ of certiorari was extended to August 31, 1945, by order of this Court dated June 16, 1945. (R. 31). The jurisdiction of this Court is invoked under Section 3(b)

of the Act of February 13, 1925, as amended by the Act of May 22, 1939.

STATUTES INVOLVED.

The pertinent provisions of the Revenue Act of 1932 and of the Regulations of the Treasury Department relating to gift taxes are printed in the Appendix, pages 13-19, *infra*.

QUESTION PRESENTED.

The Court of Claims was required to find the fair market value for gift tax purposes of 160,000 shares of one corporate stock and 20,000 shares of another. In determining fair market value that court considered, as one factor among many, the effect upon fair market value of the size of the blocks of stock to be valued. In so doing, the court refused to be bound by the quoted prices at which very much smaller numbers of shares of these stocks were selling on the New York Stock Exchange at or about the date of the gifts. Petitioner does not challenge the correctness of the court's determination of value, upon all the facts, but insists that the court was bound to adhere to quoted stock market prices and was not at liberty to consider other evidence of actual value.

The question presented is whether the Court of Claims erred by finding actual fair market values instead of adopting petitioner's restrictive formula.

STATEMENT.

The Special Findings of the Court of Claims (R. 5-17) may be summarized as follows:

On November 19, 1934, respondent, a citizen and resident of New York State, donated 160,000 shares of the common stock of Great Western Sugar Company and

20,000 shares of the common stock of South Porto Rico Sugar Company to four trusts. Each trust received 40,000 shares of Great Western stock and 5,000 shares of South Porto Rico stock. (R. 5, 6).

Respondent filed a federal gift tax return and reported these gifts for taxation (R. 5). They were valued on the return at $28.125 per share for the Great Western stock and $24.50 per share for the South Porto Rico stock. These two stocks were listed on the New York Stock Exchange and the returned values represented the mean between the highest and lowest quoted selling prices on the date of the gift. (R. 6). By claim for refund (R. 6) and suit in the Court of Claims (R. 1), respondent maintained that he had overvalued the Great Western and South Porto Rico stocks on the return.

Great Western Sugar Company is a domestic beet sugar producer (R. 9). South Porto Rico Sugar Company is an off shore producer of cane sugar in Puerto Rico and Santo Domingo (R. 12). In November 1934 and for some time prior thereto sugar producers suffered from an oversupply of sugar in the world markets and a resulting steady decline in sugar prices (R. 14, 15). By reason of this fact, as well as the tariff situation and uncertainty regarding sugar quotas which materially reduced the salable sugar, informed opinion in financial circles at that time considered the outlook for future earnings of these corporations to be unfavorable (R. 15).

Both Great Western and South Porto Rico common stocks were traded in on the New York Stock Exchange (R. 6, 10, 11, 12, 13, 14). At November 1934 both the prices at which these stocks sold and the volume in which they were traded had been declining steadily for

a year (R. 15). They were moving down against a rising market in which the better grade industrials more than held their own during the same period. (R. 15).

On November 19, 1934, 2,500 shares of Great Western were sold on the Exchange (R. 10). During the week ended November 24, 1934, 7,100 shares were sold and, for the whole month, 26,900 shares (R. 11). For the same period the daily, weekly and monthly sales of South Porto Rico were 900, 4,300 and 19,600 shares respectively. (R. 13, 14).

The markets for Great Western and South Porto Rico stocks on or about November 19, 1934, were reasonably good from the standpoint of volume of trading, free from misrepresentation or manipulation, and were free, open markets where prices were determined by supply and demand. The prevailing prices of these stocks on the New York Exchange on November 19, 1934, were fair prices for the volume of stock being traded on the market at that time. (R. 15).

On November 19, 1934, an additional 160,000 shares of Great Western common stock or 20,000 shares of South Porto Rico common stock could not have been sold on the New York Stock Exchange without depressing the price.* The size of a block of corporate shares

*The Court of Claims stated in its opinion (R. 23)—"Any attempt to dispose of these blocks of Great Western and South Porto Rico would have depressed the market over the long term necessary to sell the shares. There was no particular demand for either of these stocks in excess of the amount being currently traded in. The 160,000 shares of Great Western represent 6,400% of the 2,500 shares actually traded on November 19, 1934, 3,700% of the 7,100 shares sold during that week, and 816% of the 26,900 shares sold during November 1934. The 20,000 shares of South Porto Rico were 2,222% of the 900 shares actually sold on November 19, 1934, 465% of the sales of 4,300 shares for the week, and 102% of the sales of 19,600 shares for the month of November."

becomes an important element in determining the amount that can be realized from the sale of those shares on a given date when the block is larger than the current market can absorb without price dislocation. On occasion the amount which can be realized from the individual shares making up the block may be enhanced if the block carries with it control of the corporation and a purchaser anxious to secure that control can be found. The element of control stock did not prevail with respect to the stock involved in this case since 160,000 shares of Great Western was equal to only 8.89 percent of a total of 1,800,000 shares outstanding, and the 20,000 shares of South Porto Rico was equal to only 2.68 percent of a total of 745,735 shares outstanding. (R. 16).

The method of marketing these blocks of Great Western and South Porto Rico stocks which would have yielded the greatest return to a seller on November 19, 1934, would have been a sale to a group of investment bankers forming an underwriting syndicate for the purchase of the shares with the intention of reselling them to the public. In the case of the Great Western stock two or three bankers would probably have constituted the original purchasing group who would have associated with them a secondary group of ten or twelve to spread the risk. A third or selling group of several times that number would have been assembled. The syndicate would plan to offer the stock to the public through the facilities of its selling group at a price fractionally under the market in order to stimulate sales. For the Great Western stock on November 19, 1934, the offering price to the public would have been in the neighborhood of 27½ as against a low for the day on the Exchange of 27⅞. For their services and expenses the underwriters and their associates would require a spread or compensation of about 2½ to 3 points

a share which would be deducted from the public offering price in figuring the amount which the underwriters would pay for the stock. Under a sale in that manner, a seller of 160,000 shares of Great Western Stock on November 19, 1934, could reasonably have expected to have received approximately $25 a share. A similar method of marketing the South Porto Rico stock would have been followed except that the smaller money risk involved would have permitted the elimination of the secondary group of underwriters and would thus have eliminated a portion of the underwriting spread. That transaction could have been handled on a 2 point spread with the public offering of the shares at 24 (against a market low for the day of 24¼) and the consequent payment to the seller by the underwriters of $22 a share. (R. 16, 17).

The actual fair market value on November 19, 1934, of the 160,000 shares of stock of Great Western was $25 a share, or $4,000,000; and the actual fair market value of the 20,000 shares of stock of South Porto Rico on November 19, 1934, was $22 a share, or $490,000. (R. 17).

ARGUMENT.

The Court of Claims decided this case on two grounds. The court held, and petitioner does not question, that respondent proved that the actual fair market value of Great Western stock was $25.00 per share and that the actual fair market value of South Porto Rico stock was $22.00 per share, both on the date of gift, November 19, 1934. The court likewise held that the admission of respondent's evidence on value was fully sanctioned by the Regulations issued by the Treasury.

1. Fair market value is a question of fact.

Value is an ultimate fact to be established. There is no general rule of thumb or formula which must be followed in every case to the exclusion of all other factors. As this Court says in *Standard Oil Co.* v. *Southern Pacific Co.*, 268 U. S. 146, 156:

> "The ascertainment of value is not controlled by artificial rules. It is not a matter of formulas, but there must be a reasonable judgment having its basis in a proper consideration of all relevant facts."

Sec. 506 of the Revenue Act of 1932 provides that—

> "If the gift is made in property, the value thereof at the date of gift shall be considered the amount of the gift."

Both petitioner and respondent agree that the unadorned word "value" in the statute means *fair market value*. The Treasury Regulations, quoted in the Appendix, pages 14-19, *infra*, provide that "the value of property is the price at which such property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell." In other words, it is a price negotiated at arms length, which, where no sale actually takes place, must be established by competent and convincing evidence, as was done in this case.

The Court of Claims found as a fact that a possible purchaser or purchasers of Great Western or South Porto Rico stock on the date of the gift would take into consideration the number of shares here involved; and that a seller of that number of shares would be compelled to negotiate with an underwriting syndicate in order to secure the highest return. In the face of such a finding it is idle to urge, as petitioner does, that a

rigid standard of stock market prices should be substituted, after respondent has proved and the court below has found that there was no willing buyer for these shares at stock market prices.

The effect of size or number of units on market price is well known. It is a fact to be reckoned with. Petitioner's position ignores the well known fact that quantity purchases in our economy are ordinarily made at a discount. Every well informed buyer would expect to pay less for fifty bales of hay than for one bale if the supply exceeds the demand. This is true of wheat, hogs and corporate stocks. *Commissioner* v. *Shattuck,* (C. C. A. 7), 97 F. 2d, 790, 792.

Respondent has never claimed that size alone creates a legal presumption but only that it is a factor to be considered, insofar as it has a demonstrable effect on fair market value. The Board of Tax Appeals (now the Tax Court) stated the matter very well in *Safe Deposit & Trust Co. of Baltimore,* 35 B. T. A. 259, 263-264:

> "'Blockage' is not a law of economics, a principle of law, or a rule of evidence. If the value of a given number of shares is influenced by the size of the block, this is a matter of evidence and not of doctrinaire assumption. See *James Couzens,* 11 B. T. A. 1040, 1161; *T. B. Hoffer,* 24 B. T. A. 22; *Laird* v. *Commissioner,* 85 F. 2d 598; *Rogers* v. *Strong,* 72 F. 2d 455; *William S. Gordon, Trustee,* 33 B. T. A. 460; *St. Louis Union Trust Co. et al., Trustees,* 30 B. T. A. 370, 381; *Frank J. Kier et al., Executors,* 28 B. T. A. 633."

No doubt petitioner is correct (Petition, page 10) in saying that many estate and gift tax cases are pending before the Bureau of Internal Revenue in which this question is involved as an element in valuation.

We venture to assert, however, that a far greater number of cases are before the Bureau for decision on other fact questions, such as the time for deducting bad debts or what constitutes reasonable compensation. Taxpayers and the Bureau frequently disagree about the facts of a case but that has never been regarded as a ground for the exercise of the discretionary jurisdiction of this Court. Actually, this Court has three times refused review in the very type of case which petitioner here presents. *Helvering* v. *Maytag*, 316 U. S. 689 (125 F. 2d 55); *Phipps* v. *Commissioner*, 317 U. S. 645 (127 F. 2d 214); *Gamble* v. *Commissioner*, 306 U. S. 664 (101 F. 2d 565).

The state of the law is not in confusion on this point. The courts have uniformly treated the effect on value of the size of a block of securities as a question of fact to be proved. Where, as here, the proof is to the satisfaction of the court, the taxpayer wins.* If he fails to sustain the burden of proof, he loses.**

The majority of cases arise in the Tax Court, which, with its predecessor the Board of Tax Appeals, has proved itself fully able to deal with them. The burden on any trial court in this type of case is no greater than

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* *Groff* v. *Munford* (C.C.A. 2) decided July 19, 1945 (1945 Prentice-Hall, par. 72631); *Helvering* v. *Maytag*, *supra*; *Helvering* v. *Safe Deposit & Trust Co. of Baltimore* (C.C.A. 4), 95 F. 2d 806; *Commissioner* v. *Shattuck*, *supra*; *Page* v. *Howell* (C.C.A. 5), 116 F. 2d 158; *Helvering* v. *Kimberly* (C.C.A. 4), 97 F. 2d 433; *DuPont* v. *Deputy* (Dist. Ct. Del.), 26 F. Supp. 773; *Jenkins* v. *Smith* (Dist. Ct. Conn.), 21 F. Supp. 251; *Avery* v. *Commissioner*, 3 T. C. 963; *DuPont* v. *Commissioner*, 2 T. C. 246; *Estate of Frederick Bodell*, 47 B.T.A. 62.

** *Richardson* v. *Commissioner* (C.C.A. 2), decided August 17, 1945 (1945 Prentice-Hall, par. 72649); *Mott* v. *Commissioner* (C. C. A. 6), 139 F. 2d 317; *Phipps* v. *Commissioner*, *supra*; *Gamble* v. *Commissioner*, *supra*; *Bull* v. *Smith* (C.C.A. 2), 119 F. 2d 490; *Groff* v. *Smith* (Dist. Ct. Conn.), 34 F. Supp. 319; *Allen* v. *Commissioner*, 3 T. C. 1224.

the ordinary burden of weighing the evidence and finding the facts. The petitioner had its day in the Court of Claims and has not shown convincing grounds for a review of the decision of that court.

2. The Treasury Regulations support the decision of the Court of Claims.

The Gift Tax Regulations applicable to the valuation of shares of stock are quoted in the Appendix, pages 14-19. The original Regulations 79 (1933 Edition) have been twice amended, once in 1936 and again in 1939.

In their original and amended form, the Regulations provided substantially as follows with respect to valuation:

1. (1933-1936). Listed stocks shall be valued at the mean between high and low selling prices on the stock exchange, *except where such selling prices do not reflect the fair market value of the gift.* (Regulations 79, 1933 Edition, Appendix, page 14, 15).

2. (1936-1939).. Listed stocks shall be valued at the mean between high and low selling prices on the stock exchange. *Each share of stock is to be valued separately and the size of the gift of any security is not a relevant factor and will not be considered in such determination of value.* (Regulations 79, 1936 Edition, Appendix, page 15, 16).

3. (1939-1945).. Listed stocks shall be valued at the mean between high and low selling prices on the stock exchange. *Where such method does not reflect the fair market value of the gift, then some reasonable modification or other relevant facts and elements of value shall be considered in determining fair market value.* (Treasury Decision 4901, approved May 18, 1939, Appendix, page 17, 19).

It is at once apparent that No. 1 and No. 3, above, set forth substantially the same standard. No. 1 was in force when the gifts in this case were made. No. 3 is now in force and has been since 1939. They provide a general rule of valuation—the mean between high and low prices on the exchange—but require the use of that rule only so long as it reflects fair market value of the actual gift. If it does not, the way is open to prove what is fair market value under the particular circumstances. Plaintiff in this case has proved, *first*, that the exchange prices did not constitute fair market values here and, *second*, what the fair market values actually were. This proof is in strict accordance with the Regulations in force from 1933 to 1936 and from 1939 to the present day. The Court of Claims so holds in its opinion. (R. 20).

The Regulations paraphrased in No. 2, above, while they were in force, undoubtedly were intended to support just such an argument as petitioner makes in this case. They introduced and kept in force, from 1936 to 1939, a rigid rule which ignored realities. This rule was rejected by the courts and finally withdrawn by the Department. See Opinion, (R. 20); *Helvering* v. *Maytag, supra,* at pages 62-63; *DuPont* v. *Deputy, supra,* at page 783. In the last named case the court said:

> "The defendant relies upon an amendment to the gift tax regulations in 1936 which provides: 'The size of the gift of any security is not a relevant factor and will not be considered in such determination.'
>
> "By this regulation the Commissioner substituted an arbitrary rule for the statutory provision that the value of the property should govern. Litigation resulted. The courts have been unanimous in declaring that the determining of value is

not to be restricted by such arbitrary rule and that all relevant factors must be considered. The size of the block of securities is a relevant factor."

CONCLUSION.

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

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APPENDIX.

Revenue Act of 1932,* c. 209, 47 Stat. 169:

TITLE III—GIFT TAX

SEC. 501. IMPOSITION OF TAX

(a) For the calendar year 1932 and each calendar year thereafter a tax, computed as provided in section 502, shall be imposed upon the transfer during such calendar year by any individual, resident or nonresident, of property by gift.

(b) The tax shall apply whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible; * * *.

SEC. 502. COMPUTATION OF TAX.

The tax for each calendar year shall be an amount equal to the excess of—

(1) a tax, computed in accordance with the Rate Schedule hereinafter set forth, or the aggregate sum of the net gifts for such calendar year and for each of the preceding calendar years, over

(2) a tax, computed in accordance with the Rate Schedule, on the aggregate sum of the net gifts for each of the preceding calendar years.

* * * * *

SEC. 504. NET GIFTS.

(a) *General Definition.*—The term "net gifts" means the total amount of gifts made during the calendar year, less the deductions provided in section 505.

(b) *Gifts Less Than $5,000.*—In the case of gifts (other than of future interests in property) made to any person by the donor during the calendar year, the first $5,000 of such gifts to such person shall not, for the purposes of subsection (a), be

*Gift tax provisions of the Internal Revenue Code apply only to 1940 and later years. See Section 1000 (a).

included in the total amount of gifts made during such year.

SEC. 505. DEDUCTIONS.

In computing net gifts for any calendar year there shall be allowed as deductions:

(a) *Residents.*—In the case of a citizen or resident—

(1) *Specific Exemption.*—An exemption of $50,000, less the aggregate of the amounts claimed and allowed as specific exemption for preceding calendar years.

* * * * *

SEC. 506. GIFTS MADE IN PROPERTY.

If the gift is made in property, the value thereof at the date of the gift shall be considered the amount of the gift.

SEC. 530. RULES AND REGULATIONS.

The Commissioner, with the approval of the Secretary, shall prescribe and publish all needful rules and regulations for the enforcement of this title.

Treasury Regulations 79 (1933 ed.):

ART. 19. *Valuation of property.*—(1) *General.*—The statute provides that if the gift is made in property, the value thereof at the date of the gift shall be considered the amount of the gift. The value of property is the price at which such property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell. Where the property is sold within a reasonable period after the date of the gift, and it is shown that the selling price reflects the fair market value thereof as of the date of the gift, the selling price will be accepted as the amount of the gift. * * *

(3) *Stocks and bonds.*—The value of stocks and bonds listed upon a stock exchange should be deter-

mined by taking the mean between the highest and lowest quoted selling prices upon the date of the gift, except where such selling prices do not reflect the fair market value of the gift. If the gift was made on Sunday or on a holiday, the transactions of the next previous business day will govern. If there were no sales on the date of the gift, the value should be determined by taking the mean between the highest and lowest quoted selling prices upon the nearest date either before or after the date of the gift, if within a reasonable period. If the security is listed upon more than one exchange, the records of the principal exchange should be employed. In valuing listed stocks and bonds the donor should observe care to consult accurate records to obtain values as of the date of the gift.

* * * * *

Treasury Regulations 79 (1936 ed.):

ART. 19. *Valuation of property.*—(1) *General*—The statute provides that if the gift is made in property, the value thereof at the date of the gift shall be considered the amount of the gift. The value of the property is the price at which such property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell. The value of a particular kind of property is not to be determined by a forced sale price or by an estimate of what a whole block or aggregate would fetch if placed up the market at one and the same time. Such value is to be determined by ascertaining as a basis the fair market value at the time of the gift of each unit of the property. For example, in the case of shares of stocks or bonds, such unit of property is a share or a bond. All relevant facts and elements of value as of the time of the gift should be considered. Depreciation or appreciation in value subsequent to the time of the gift are not relevant factors and will not be considered.

* * * * *

(3) *Stocks and bonds.*—The value at the date of the gift in case of stocks and bonds, within the meaning of the statute, is the fair market value per share or bond on such date.

The value of stocks and bonds listed upon a stock exchange shall be obtained by taking the mean between the highest and lowest quoted selling prices upon the date of the gift. * * *

* * * * *

In exceptional cases in which it is established by clear and convincing evidence that the value per bond or share of any security determined upon the basis of selling or bid and asked prices as herein provided does not reflect the fair market value thereof, other relevant facts and elements of value will be considered in determining the fair market value. The size of the gift of any security is not a relevant factor and will not be considered in such determination.

Subdivisions (1) and (3) of Article 19 of Treasury Regulations 79 (1936 ed.), quoted above, were amended by T. D. 4901, approved May 18, 1939, 1939-1 Cum. Bull. (Part 1) 341, to read as follows (pp. 341-342):

(1) General.—The statute provides that if the gift is made in property, the value thereof at the date of the gift shall be considered the amount of the gift. The value of the property is the price at which such property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell. The value of a particular kind of property is not to be determined by a forced sale price. Such value is to be determined by ascertaining as a basis the fair market value at the time of the gift of each unit of the property. For example, in the case of shares of stock or bonds, such unit of property is a share or a bond. All relevant facts and elements of value as of the time of the gift should be considered.

(3) *Stocks and bonds.*—The value at the date of the gift in the case of stocks and bonds, within the meaning of the statute, is the fair market value per share or bond on such date.

In the case of stocks and bonds listed on a stock exchange the mean between the highest and lowest quoted selling prices on the date of the gift shall be considered as the fair market value per share or bond. If there were no sales on the date of the gift, such value shall be determined by taking the mean between the highest and lowest sales on the nearest date before and the nearest date after the date of the gift (both such nearest dates being within a reasonable period), and by prorating the difference between such mean prices to the date of the gift, and by adding or subtracting, as the case may be, such prorated portion of the difference to or from the mean price obtaining on such nearest date before the date of the gift. For example, assume that sales of stock nearest the date of the gift (June 15) occurred two days before (June 13) and three days after (June 18) and that on such days the mean sale prices per share were $10 and $15, respectively. The price of $12 shall be taken as representing the fair market value of a share of such stock as of the date of the gift. If, however, on June 13 and June 18 the mean sale prices per share were $15 and $10, respectively, the price of $13 shall be taken as representing the fair market value of a share of such stock as of the date of the gift. If the security was listed on more than one exchange, the records of the exchange where the security is principally dealt in should be employed. In valuing listed stocks and bonds the donor should observe care to obtain values as of the date of the gift.

In the case of stocks and bonds which are not listed upon an exchange, but are dealt in through brokers, or have a market, the fair market value shall be determined by taking the mean between the highest and lowest selling prices as of the date

of the gift; or, if there were no sales on that date, such value shall be determined by taking the mean between the highest and lowest sales on the nearest date before and the nearest date after the date of the gift (both such nearest dates being within a reasonable period), and by prorating the difference between such mean prices to the date of the gift, and by adding or subtracting, as the case may be, such prorated portion of the difference to or from the mean price obtaining on such nearest date before the date of the gift. If quotations are obtained from brokers, or evidence as to the sale of securities is obtained from the officers of the issuing companies, the donor should preserve in his files the letters furnishing such quotations or evidence of sale for inspection when the return is verified by an investigating officer.

If actual sales are not available during a reasonable period beginning before and ending after the date of the gift, the fair market value may be determined by taking the mean between the bona fide bid and asked prices on the nearest date before and the nearest date after the date of the gift (both such nearest dates being within a reasonable period), and by prorating the difference between such mean prices to the date of the gift, and by adding or subtracting, as the case may be, such prorated portion of the difference to or from the mean price obtaining on such nearest date before the date of the gift.

If actual sale prices or quoted bona fide bid and asked prices are available on a date within a reasonable period prior to the date of the gift, and if no actual sale prices or bona fide bid and asked prices are available on a date within a reasonable period after the date of the gift, or vice versa, then the mean between such highest and lowest available sale prices or bid and asked prices may be taken as the value.

If actual sales or a bona fide bid and asked prices are not available, then, in the case of corporate or other bonds, the value is to be arrived at by giving consideration to the soundness of the security, the interest yield, the date of maturity, and other relevant factors, and, in the case of shares of stock, upon the basis of the company's net worth, earning power, dividend-paying capacity, and all other relevant factors having a bearing upon the value of the stock. Complete financial and other data upon which the donor bases his valuation should be submitted with the return.

In cases in which it is established that the value per bond or share of any security determined on the basis of selling or bid and asked prices as herein provided does not reflect the fair market value thereof, then some reasonable modification of such basis or other relevant facts and elements of value shall be considered in determining fair market value.

The provisions quoted next above from T. D. 4901 now appear verbatim as Section 86.19 (a) and (c) of Treasury Regulations 108 (1943 ed.) relating to gift tax for years subsequent to 1939 under the Internal Revenue Code.